UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Cases No. 08-15051-SMB, 09-10371-SMB

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In the Matter of:

DREIER LLP,

Debtor.

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In the Matter of:

MARC S. DREIER,

Debtor.

- - - - - - - - - - - - - - - - - - - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

May 27, 2010

10:16 AM

B E F O R E:

HON. STUART M. BERNSTEIN

U.S. BANKRUPTCY JUDGE

Chapter 11 Trustee's Motion to Approve Compromise (Renewed) Pursuant to Section 105(a) of the Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedure, for Approval of Certain Agreements

Transcribed by: Dena Page

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P R O C E E D I N G S

THE COURT: Dreier?

MR. LODEN: Good morning, Your Honor.

THE COURT: Good morning.

MR. LODEN: Steve Loden on behalf of the Chapter 11 trustee.

We're here this morning on the trustee's renewed motion with respect to the GSO settlement. I obviously will have a few comments. Following me, I believe, Mr. Shore on behalf of GSO, would like to speak on behalf of the motion, as well.

Your Honor, we previously gave a detailed presentation on the settlement that's before the Court, and in the Court's memorandum decision, the Court did find that the settlement was reasonable but pointed out problems with the bar order. So we have gone back with GSO to fix those problems, and the result is the amended settlement that's before the Court today. As to the reasonability of that amended settlement, the monetary terms are unchanged from what was previously presented to the Court. The coordination agreement with the government is unchanged from what was previously presented. So those are the same terms as the Court found previously reasonable. To the extent Gardi attacks, again, the reasonability of the settlement, we think those attacks also fall short for the same reasons they did the first time.

As to the bar order itself, in the memorandum

decision -- in the memorandum decision, the Court found that it could "bar creditors from recovering their claims from GSO where their claims are (1) based on the debtor's misconduct, and (2) there is no independent basis for an action against GSO other than its receipt of the transfers from Dreier LLP." The revised bar order before the Court today follows that construction. To be covered by the revised bar order, your claims must meet two conditions. First, the claims must relate to your status as a creditor in this case, and second, the claims must be based on either the debtor's misconduct or GSO's receipt of note fraud funds. And to ensure there's no confusion about those conditions, the bar order also has saving language, and that language says, just to be clear, if you have an independent basis to sue GSO that's unrelated to your status as a creditor and your claims are not based on the debtor's misconduct or GSO's receipt of the note fraud funds, then you are not barred from presenting those claims by this bar order.

THE COURT: Let me ask you a question. Suppose I'm a GSO investor, and I have a claim for the distribution of those funds. Wouldn't that claim be barred because it's based on the receipt of the note fraud funds?

MR. LODEN: It's not -- no, Your Honor. The answer is no, and because it relates to an independent relationship you have with GSO. In that instance, you are an investor with GSO, and the basis of your claim is that GSO should distribute those

proceeds to you as an investor in GSO. It's not a claim based upon your status as a creditor in this case.

THE COURT: Yeah, I understand. Okay.

MR. LODEN: Now, Gardi does not offer any examples in its papers of claims that it might think were inappropriately caught by the bar order, but we have spent a lot of time thinking of such examples, as the Court just referenced. We don't know of any such claims in fact; it's all hypothetical. But for example, as the Court just stated, if an investor thinks that GSO should release funds -- or, proceeds from the note fraud funds, that claim is not covered.

How about a creditor that hired GSO to provide advice on a wholly unrelated transaction? That claim's not covered, either. Why? Because the claim is not based on the debtor's misconduct or GSO's receipt of the note fraud funds.

We even took it one step further and said, what if there's a creditor, another hedge fund in this case, that hired GSO to advise on its investment in the note fraud fund. Would that claim be covered? The answer is no. Why? Because it relates to an inde -- it arises from an independent relationship with GSO and the parties seeking that advice, and it's not based on the debtor's misconduct or GSO's receipt of note fraud funds.

Gardi doesn't say that it holds any of those such claims, but even if such a claim did exist, it's not covered by

the bar order. Nor does Gardi assert that it has any basis to sue GSO separate and apart from its status as a creditor today. So make no mistake about it. Gardi knows exactly what claims are covered by the borrower, and that's why it objected: because its claims are covered by the bar order.

Now, Gardi says that everything should be left in limbo until we know whether it's actually a creditor in this case. Gardi filed multiple proofs of claim in this case, so he obviously believes that he's a creditor. Those claims are deemed allowed until they're objected to, and no objection's on file. So there's no basis to hold this up simply because Gardi is now rethinking its decision to file claims in this case.

THE COURT: Well, even if the claim's disallowed, he's still a creditor.

MR. LODEN: That's true; that's true. But more fundamentally, it doesn't matter whether Gardi is a creditor or not. It's completely irrelevant to whether -- to Gardi's efforts to press its claims against GSO because this Court ruled in the memorandum decision that claims to compel GSO to repay Ponzi scheme proceeds are owned by the trustee in this estate. Thus the automatic stay applies and precludes all third parties -- not just creditors -- all third parties from usurping the trustee's rights to bring those claims.

THE COURT: Well, Gardi's in a little different situation which I dealt with. He claims to have an essence of

property interest in the fund. He's not saying he's a general unsecured creditor in this.

MR. LODEN: And he's made those arguments via a lift stay motion --

THE COURT: I've dealt with that.

MR. LODEN: Right. So, Your Honor, we think the "we should wait until we find out if we're a creditor" argument, it's a complete red herring. It has no relevance at all to the issue before the Court today. Plus, the delay that Gardi seeks would absolutely wreak havoc in this case. Not only would it delay the coordination agreement with the government, thus forcing disputes with the government, it would delay the forfeiture itself, thus delaying payments to credit -- to crime victims in the forfeiture. And I know Matt Schwartz, on behalf of the government, is here today, and he may want to speak to that delay.

The delay also puts other settlement discussions in limbo because, as we've said multiple times, without the ability to give a bar order, no one is going to settle with the trustee.

One final note about Marc Dreier's 341 testimony that's referenced in Gardi's response. Gardi says that this is newly-discovered evidence that proves it can trace JANA's Funds into GSO's hands. That testimony does nothing of the sort. It merely confirms --

THE COURT: That doesn't matter. It doesn't matter. I assume that for the purposes of the decision.

MR. LODEN: I agree, Your Honor.

THE COURT: Okay.

MR. LODEN: It's completely irrelevant.

THE COURT: Let's get back to the --

MR. LODEN: If the Court agrees, then I'll skip that presentation entirely.

THE COURT: Let's get back to the bar order.

MR. LODEN: Your Honor, then, for the reasons stated, we ask the Court to grant the motion. As I said at the outset, I believe Mr. Shore would also like to speak on behalf of GSO in support.

THE COURT: Okay, I just -- maybe I should ask Mr. Shore. I'll hear from -- let me hear Mr. Shore, because I have a question.

MR. LODEN: Thank you, Your Honor.

MR. SHORE: Thank you, Your Honor. Chris Shore from White & Case for the GSO parties. I'm happy to answer whatever questions you have with respect to the bar order. We read your decision. The clients are perfectly willing to operate under that decision but just want, as you would expect, full closure to the fullest extent of the Court's subject matter jurisdiction. If we wrote an order that says we're released to the fullest extent to the Court's subject matter jurisdiction,

I think that's within the spirit of what the parties want. The question is how to draft that.

I think, Your Honor -- and there are really, I guess, two issues. First of this issue of the threshold of the creditor and party-in-interest. And then the second issue is, what happens if you are a creditor and party in interest. What kind of claims can you bring that are outside the jurisdiction of the Court? The first issue, I think, is to some extent a due process issue. You are given status to appear in a bankruptcy court and be heard -- either as a creditor or a party-in-interest -- to complain about the settlement. I think you then can be bound into the settlement. So it's a question of both due process and personal jurisdiction which the Court now has over the Gardi parties.

The next question is once they're in the case, what kind of claims can the Court bar? It's not just, as they suggest, claims that belong to the debtor. We don't need a bar injunction for that; that's going to be covered in the discharge injunction. These are claims that the Gardi parties would claim to have directly against GSO, arising out of some relationship between GSO and the Gardi parties. If the only relationship between Gardi and GSO is the fact that they both did business, wrongfully or inadvisably, with Marc Dreier or Dreier, LLP, that's exactly where the Court's subject matter jurisdiction covers because the Code is intended to take like-

situated creditors -- GSO and Gardi -- and treat them fairly with respect to a pot of assets. So if the claim exists only because the interface between Gardi and GSO is their like status as creditors of this estate, then those claims can be barred, and that provides the mechanism by which the Court can say Gardi, as a creditor and party-in-interest, GSO, the hedge funds, you can all share ratably in the assets of this debtor.

If, however, there is a claim which exists, notwithstanding the fact of the creditor interface, that's not released. So that's -- the intent, here, is the draft language which says if you're not -- if you have a claim which arises independently of your status of being a creditor or party-in-interest in the case, and it's not related to the note fraud funds and the receipt of the note fraud funds, that language in that saving sentence there, then that is a claim you can bring. And that's the way we allow for -- and it was never our intent to bar a claim of a GSO employee or GSO creditor or something like that, but rather to make clear that if you are saying, I suffered an injury based upon the debtor's misconduct or upon the fact that GSO is holding the funds, then that is going to be released. And you are going to be channeled, like the Court -- or, the Second Circuit gathered in Metromedia, the channeling injunction cases -- you're going to be channeled to that fund to seek redress for that injury.

So that's purely the intent. The question is just how

to get there. I think we got there with the language by putting in the dual concept of you've got to be -- it's got to be based solely -- or, it's got to be based on something other than your status as a creditor and party-in-interest and it's got to be something other than related to the note fraud funds.

So if you have any questions, I'm happy to answer them. But that's what we're trying to draft.

THE COURT: Let me hear from Gardi's counsel.

MR. LORENZO: Good morning, Your Honor. Alex Lorenzo from Alston + Bird for Paul Gardi and Alex Interactive Media.

As an initial matter -- and I want to touch on something that the trustee's counsel brought up -- we recognize the significant consideration that went into your April 28th decision. As you see from our papers, we're not looking to reargue those points. We respectfully disagree, but this is neither the time nor place, and we've incorporated our previous objections. And this morning, I'm here to incorporate the points raised on oral argument when we were here in February.

I think one of the interesting things and one of the differences from last time we were before you is you can see I'm standing alone; there are no other objectors to this bar order. And I think that's telling --

THE COURT: It's a smaller courtroom.

MR. LORENZO: It's telling and informative, Your Honor, because unlike the hedge fund objectors, we will never

benefit from a bar order.

THE COURT: What's the claim that Gardi has that your concern is being cut off by this bar order?

MR. LORENZO: I think there are two types of claims, Your Honor. One, we are worried -- and I think the comments today -- we are worried that, ultimately, it's going to be determined, or there's going to be a big fight and we're not going to be determined to be a creditor to the estate, that our proof of --

THE COURT: That's got nothing to do with this settlement.

MR. LORENZO: Well, it does -- and this brings in -- and it was interesting to hear the argument today because what I'm reading, and looking through -- and on page 5 and 6 of our papers, we do a redline between this amended bar order and the previous bar order -- at best, it seems internally inconsistent. It doesn't seem like they have complied --

THE COURT: In what way?

MR. LORENZO: Well, to start, the first sentence still reads that "any and all creditors, parties-in-interest, and any entity or person that files a proof of claim in this Chapter 11 or Chapter 7 case shall be permanently enjoined from commencing", and then, rather than limiting the types of action, it in fact expands the types of actions that are barred.

THE COURT: It's basically all claims and causes of action. You can put in all the verbs or all the nouns that you want, but that's what it is.

MR. LORENZO: No, no, and that's what it appears to be. Our understanding, though, of the April 28th decision, and I think what they try to do in the text at the end of the order is try and cut out claims that are, sort of, brought by third parties, the issue being, if we are ultimately determined not to have a claim in the bankruptcy --

THE COURT: Right.

MR. LORENZO: -- which we --

THE COURT: What's the claim, though --

MR. LORENZO: Well, I think --

THE COURT: Let me ask you a question.

MR. LORENZO: Sure.

THE COURT: What's the claim that you would want to bring against Dreier's estate or the LLP estate that depends at all upon your status as a creditor --

MR. LORENZO: Against the --

THE COURT: -- or not being a creditor?

MR. LORENZO: Your Honor, against the LLP estate or against GSO?

THE COURT: Either one, either one. I'll just say Dreier. What's the claim that you're concerned about bringing that you're fearful will somehow be adversely affected under

this bar order, if your not a -- if your claim is disallowed?

MR. LORENZO: If our claim is disallowed, I think it would be a claim against GSO to pursue the money that we believe is ours. Because if our claim is disal --

THE COURT: That's exactly the claim I said you can't -- irrespective of this bar order, that's exactly the claim I said you can't bring.

MR. LORENZO: Well, and I want to -- that was the second point that I wanted to touch on, and I wanted to pick up on something on your April 28th decision. We don't concede this, but for the moment, just for arguing, you point out that JANA transferred the funds to Dreier, LLP, and then Dreier, LLP acquired legal title. And then we show -- and I think you acknowledge this, but even if you don't -- we show that the funds, then, within three days, go to the GSO parties, and the issue that is in dispute, and we respectfully disagree, but is whether or not Dreier, LLP was able to transfer legal and equitable good title to GSO. For the moment, assuming they are, which we contest, what the trustee is effectively doing is, Dreier didn't have good title. It had legal title, but the funds were held in escrow. And this is the point that was raised very early in the bankruptcy when they released escrow funds to clients because Dreier didn't have equitable title to these funds and creditors weren't entitled to get them. So the funds go to GSO; Dreier never -- they're stolen funds; Dreier

never has equitable title. In the preference action, they're now seeking to bring back these funds, and it's a little bit of a slight of hand because the funds coming back, they're claiming actually belong to the estate, that they have legal and equitable title, even though when they left the estate, they only had legal title. And so they're using -- and this is where the "but" in their point and --

THE COURT: No, that's not what's happening here. What they're recovering is whatever title or whatever interest Dreier had. Your problem -- that's not the problem with Gardi's claim. The problem with Gardi's claim is that even if he would be entitled to impose a constructive trust under non-bankruptcy law, I ruled that he's not entitled to a constructive trust under bankruptcy law. Because no one else has equitable title, in essence, the estate gets equitable title to those funds because nobody's got a greater interest.

MR. LORENZO: And I think in --

THE COURT: But that's got nothing to do with the bar order.

MR. LORENZO: Well, I think the concern of the bar order -- and obviously, as you see in our notes of appeal, we respectfully disagree from that determination -- the problem with the bar order is, at the end of the day, if it's determined that we don't have a claim in the bankruptcy estate, and we're sued through a series of actions that are

inconsistent, we're out of luck because if you said that we don't have a claim in the bankruptcy estate, under this bar order, we, then, because we filed a proof of claim, we're prohibited from suing GSO to get the money back. The reason we wouldn't have a claim in the bankruptcy estate would be something along the lines of well, we don't really have your money; this wasn't your money. And that is a concern that we are facing.

THE COURT: How could you not have a contract claim, at a minimum, against LLP?

MR. LORENZO: Contract claim against LLP, Your Honor?

THE COURT: Or Dreier, personally, for fraud. How could you not have that claim?

MR. LORENZO: Oh, we believe we do. We believe we have a fraudulent --

THE COURT: Is there any dispute they have that claim?

MR. LODEN: Your Honor, I've got their proof of claim here.

THE COURT: Right.

MR. LODEN: And that's exactly -- well, they make two arguments in their proof of claim, one of which counsel is making this morning. They clearly make the constructive trust argument. The legal title arguments --

THE COURT: I'm not talking about that. Is there any question that they have, at a minimum, an unsecured claim

against LLP for failing to pay over the settlement?

MR. LODEN: They're -- from our perspective, there's no question that Gardi has, at best, a fraud claim against Dreier, LLP and/or Marc Dreier for fraudulently stating, if it's true, that there was a settlement when, in fact, there wasn't one.

THE COURT: It doesn't matter. He made a settlement. I mean, assuming he ratifies the settlement -- he hasn't done that yet. But he made a settlement. Dreier got the money or Dreier LLP got the money. They're contractually obligated to pay it over, even if there was no fraud. Wouldn't they be?

MR. LODEN: To the extent the funds are identifiable? Perhaps.

THE COURT: What does identifiable have to do with it? It's a contract claim or a fraud claim.

MR. LORENZO: Or legal malpractice, Your Honor.

THE COURT: Well, fine.

MR. LODEN: Well, what I understand the Court --

THE COURT: All I'm asking you is if you're willing to concede that they have an unsecured claim in this case.

MR. LODEN: One moment. I think that there's --

THE COURT: If you're not, you're not. All right.

MR. LODEN: Yeah, I think that there's some factual issues that we're not able --

THE COURT: Like what?

MR. LODEN: Well --

THE COURT: He's a client of the firm.

MR. LODEN: -- as you say, they have not ratified the settlement yet. In fact, they state precisely the opposite. But certainly in terms of settlement discussions with Gardi, we would be more than willing to consider an allowance of their claim.

MR. LORENZO: I think the other claim that we are worried about, and I think this goes to a larger point -- and stop me if this is not the time to address it -- but by getting this bar order, they're not only getting rid of, sort of, the claims that creditors may have. They're getting rid of an aiding and abetting claim because, as the trustee pointed out --

THE COURT: That's an independent wrong, though.

MR. LORENZO: So would that -- well, and this is what's unclear, because under the language of the current bar order, the proposed bar order, an aiding and abetting claim by Gardi against GSO, I mean, GSO's on the hook not just for the money that they got. That would be the entire fraud. And I think that's why GSO is so eager to be done and get this bar order.

THE COURT: All right.

MR. LORENZO: As we read it, and we would be happy to hear other input on this, that type of claim would be barred

under this bar order.

THE COURT: Mr. Shore, do you think an aiding and abetting claim would be barred?

MR. SHORE: If the -- it would be barred under this order, but --

THE COURT: Then I'm not going to sign this order.

MR. SHORE: Okay, well, let me just address that, then. If what they're saying is that GSO engaged in behavior directly -- it's a question of aiding and abetting what.

THE COURT: Aiding and abetting is substantial assistance with knowledge.

MR. SHORE: Aiding and abetting with what. That's what -- right? I mean, it's the -- if they're saying --

THE COURT: Well, he's claiming he was defrauded. So he would have to show that GSO, with knowledge, gave substantial assistance to that fraud.

MR. SHORE: To that particular fraud, I don't think the bar order would cover that. What I'm talking about is if the claim is that GSO, right, was engaged in -- it's this feeder fund litigation that's out there with Madoff and everything else -- the idea that -- as opposed to -- and this is why I was trying to get to a particularized --

THE COURT: But he's not an investor in GSO.

MR. SHORE: Right. This is why I was talking about a particularized injury. If what we're talking about here is

that the Gardi parties suffered an injury which was felt by creditors as a whole, that's the kind of derivative liability you were talking about, I think, in the opinion, which is --

THE COURT: But that's not what he's talking about.

MR. SHORE: Right. If he's talking about a particularized injury, which is -- that's where the language is, other than his status as a creditor and party-in-interest. What he's saying is, I suffered a creditor injury; he should be channeled to this money. If he's saying, I suffered an independent injury that I felt independent of any other creditor in the estate, I don't think that is barred, and it was not the intent to bar that. So that's why I get to aiding and abetting what. Aiding and abetting a fraud against him, that is, we made a misrepresentation or gave substantial --

THE COURT: He has no standing and will never have standing to assert a claim that GSO aided and abetted Dreier into defrauding LLP or the estate or anybody else.

MR. SHORE: Right.

THE COURT: That's a trustee claim.

MR. SHORE: That's right.

THE COURT: But to the extent he suffers a direct injury because GSO or anybody else has committed an independent wrong which happens to relate to this case and may happen to relate to the estate, those claims are not barred.

MR. SHORE: Right.

THE COURT: Direct claims that are based on the independent wrongdoings of -- in the example that you guys gave.

MR. SHORE: That's right, that's right. And what I don't want, and what the client doesn't want and wants closure on is this notion that somehow there has to, for this individual -- or, sorry, for this creditor-wide injury, there has to be more money. If he's got some basis that he can, under Rule 11, state that GSO actively participated in this and gave substantial assistance to his particular wrong, make it. There's nothing we can do to stop a party from doing that. But it's not this creditor-wide kind of injury that we've been talking about.

MR. LORENZO: Your Honor, I think the point that you raised in your April 28th decision where you said, you know, the last time we were here, we didn't know the parties had settlement. And you said we're worried about future litigation and you want clarity in the bar order. I think that same principle applies here simply because the first half of the bar order and the second half of the bar order seem to be at odds. And I respectfully would enter that should we go ahead and sue GSO on aiding and abetting, this bar order would be thrown right back at us. And that is --

THE COURT: You can always quote the transcript. It's not the intent of the parties.

MR. LORENZO: We can always pull the transcript, but I think, if a Court -- and unfortunately, or likely, it would be a different Court who would be looking at this bar order and reading it -- I think the plain language of the bar order is at best inconsistent.

MR. LODEN: Your Honor, if I may?

THE COURT: Why don't you just use the language that I had suggested in the decision that bars creditors of the estate from recovering their claims against GSO where their claims are based on the debtor's misconduct and there's no independent basis for an action against GSO other than its receipt of the transfers from LLP?

MR. SHORE: The only thing I wanted to do to fix that, Your Honor, is address what it means to be independent. And I interpreted independent to mean, in that instance, based on something other than the fact that you were a creditor or party-in-interest in the case.

THE COURT: Well, you have to have a direct claim.

MR. SHORE: Yeah.

THE COURT: You have to have a claim with your own injury, not an injury that's suffered by the estate.

MR. SHORE: That's right. And that's what -- if that's what we want to pencil in for what "independent" means, I think that's right. You've got to have something that is particular to you. It's really this derivative shareholder

liability concept. Right.

THE COURT: That's, right now, barred by the automatic stay.

MR. SHORE: Right.

THE COURT: Does that clarify it for you?

MR. LORENZO: I think the discussion today does, but I don't think the bar order, necessarily, is clarified.

MR. LODEN: Your Honor, if I may, it's our intent, as well, that the types of aiding and abetting claims that the Court has focused on would not be covered by the bar order.

THE COURT: Why can't he --

MR. LODEN: And to the extent that Gardi has language it would like to see to get clear, beyond what's been stated on the record, we're happy to take a break and consider that language.

THE COURT: The language does say that it doesn't bar direct claims under non-bankruptcy law. If somebody has a direct claim under New York law as opposed to a claim that the estate was injured, we all know what that means, and there's a lot of case law that's -- it seems to me -- I used independent, but that seems to be what everybody's understanding is.

MR. SHORE: Yeah, and that's -- the problem is, again, what it means to be a direct claim. He has a direct claim under New York law for fraudulent conveyance. If his argument is it was my property and he gave it to Dreier, and you took it

from Dreier with knowledge, right, that would be a direct claim. So it's not just direct claim.

THE COURT: Well --

MR. SHORE: It's a claim which is as to which Gardi suffered a particularized injury that was not suffered by the creditor body as a whole.

THE COURT: Well, initially, that direct claim is barred by the automatic stay -- or, it was stayed by the automatic stay.

MR. SHORE: It's a stay, right. What we're doing is barring actions going forward.

THE COURT: Right, well, the kind -- really, what I had suggested was you can just extend the automatic stay and make it permanent as to these kinds of claims. Otherwise, you can never settle.

MR. SHORE: I agree.

THE COURT: Which is essentially what the Drexel case was talking about in the Second Circuit. Look, my own feeling is that you're not going to satisfy him. He's not interested in being satisfied. But the language is confusing.

MR. SHORE: Okay.

THE COURT: Some is written in the conjunctive, and maybe it should be the disjunctive when you're talking about misconduct, and it's got to be based on -- or, it's not based on --

MR. SHORE: It's got to be --

THE COURT: -- Dreier's misconduct or the receipt of the note funds, and it's -- I did find that a little confusing. I suspect you're not intending to cut off the types of claims that Gardi has raised and has argued about other than the fraudulent transfer language, I have no problem with dealing with expressively, and that's what Colonial Realty was dealing with.

MR. SHORE: Right.

THE COURT: But it's not the most artfully drafted. I understand it was negotiated. More stuff got piled in, rather than taken out. That's part of the problem with it. And we can clarify his concerns today, but we may not clarify concerns of somebody else if there is somebody else out there years from now.

MR. SHORE: I would -- if I could, I mean, here's what I think we're talking about right now. If we go to that last sentence, "the bar order shall not bar any claims or causes of action that are (1) unrelated to such third party status as creditors or parties-in-interest in the bankruptcy cases," which is what we've been talking about, right? If you're a creditor injury, you're channeled in. And -- or, take out the "and" there -- (2) not based on the misconduct of Marc Dreier or the GSO releasees receipt in the note fraud funds". And then I think we add in this concept, then, which is what I was

penciling down as I was hearing it before, "and (3), for which the third party has an independent basis for an action against the GSO releasees." So if you've got an independent basis, it's not just because you're a creditor or party-in-interest in the case --

THE COURT: Independent basis --

MR. SHORE: -- and it's based on this conduct we're talking about: the transfers, the receipt, the fraud by the debtors. If you've got all three of those, that's where it is. So if they've got an aiding and abetting claim, right, that is a claim -- which is based on a specific injury, that -- with respect to this transaction --

THE COURT: Well, it's a direct claim --

MR. SHORE: Right.

THE COURT: -- under non-bankruptcy law.

MR. SHORE: Right. But it's got to be, again, this is -- that it's not just a creditor injury we're talking about. If the allegation is that GSO, right, actively participated in Marc Dreier going out and settling that lawsuit and paying the money, that's a different --

THE COURT: That's an easy one because under Ionosphere, that is being settled by the estate. That's an estate claim; the estate is settling that claim. And that's a bar to any third party bringing a derivative claim for an estate injury.

MR. SHORE: Right. No, but nobody --

THE COURT: You don't even need a bar order for it.

MR. SHORE: No, no, I'm saying, look, here's the allegation, right? If the allegation is that GSO actively participated in the fraud, active substantial assistance is gave note money to Mr. Dreier, if that's the only allegation, you gave note money to Mr. Dreier and that was the substantial assistance in my -- Marc Dreier having stolen my money, I don't think -- I think that is barred by the bar order. That does not fit. That is just a generalized creditor injury. Anybody who gave money to Marc Dreier in that instance would be fit under that definition.

What we're talking about is if there is an action where he claims that in connection with my particular funds that came in, you assisted in Marc Dreier settling that lawsuit, you assisted in funding that lawsuit, you took that money with knowledge, all those things are alleged, I think that does not fit the definition I just read, then. That would then take the claim outside the bar order, and I think that addresses Your Honor's concern. Look, if GSO -- and it wasn't; let me say that on the record -- actively involved in any of this and was something other than the party who gave money to the guy and took money back from the guy, which is being settled here, they think they can allege it, there's nothing we can do, any of us can do to stop them from alleging that no

matter what bar order you enter, Your Honor.

So that's where I see it. I think if we add in that concept at the end, that it is an independent claim, you know, that brings in your language, or we can use derivative. However we want it, you know, that it's not a derivative claim. And that brings in this concept that you can't -- if fundamentally it seems unfair, if we're paying money in to resolve the injury that was caused to the estate and its creditors, and they've had an opportunity to say to Your Honor it's not enough money, and Your Honor has said it is enough money to meet the 9019 standards, then in fairness, they should be looking to that pot for their creditor injury. If they have something in injury that's not as a creditor, they're going to do what they're going to do with it.

THE COURT: Look, subject to seeing the revised language, I'm prepared to approve the settlement. I've already ruled that the settlement is reasonable, that it falls within the lowest point in the range of the level of the close range of reasonableness. But I do want to see this language -- as I suggested, it's not so artfully drafted. Maybe when you're redrafting it, you can make the paragraphs smaller, rather than larger and add more synonyms for claims, causes of action, equity, and law and whatever else you have, all right? Settle a proposed order on notice to Mr. Gardi's counsel. And if you have an objection --

MR. LORENZO: Your Honor -- Your Honor, I'd only propose that, to save Your Honor's time, if it was simply circulated to us before --

THE COURT: Well, that's another possibility. If you can get them to agree to the language, then you can submit an order and make a written representation that Gardi and Interactive (sic) have no objection to the form of the order. I understand they still have objections to what's going on and they'll file a notice of appeal and they'll reserve that.

Yes, sir.

UNIDENTIFIED SPEAKER: Your Honor, as you are aware, this is both a joint motion for the Dreier estate.

THE COURT: And you were very eloquent in the way you were --

UNIDENTIFIED SPEAKER: I've taken my measure as Your Honor knows.

THE COURT: Okay.

UNIDENTIFIED SPEAKER: So anyway, Your Honor, we also would ask for the same relief in the Dreier case, and the same argument, I note, would be echoed in both cases.

THE COURT: Okay, then I will echo the same comments I made during the prior presentation.

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

MR. LODEN: Your Honor, one other point. There's actually two settlement agreements before the Court today.

There was the coordination agreement with the government. We would ask, if the Court is prepared to do it, to order that the coordination agreement is approved subject to submission of the revised GSO --

THE COURT: Well, when I said the settlement agreement is approved, I really meant both agreements. They're linked.

MR. LODEN: Okay.

THE COURT: And you know what I'm telling you. I never had a problem with the coordination agreement and no one ever objected to it.

MR. LODEN: That's correct, Your Honor.

THE COURT: Okay, Thank you very much.

MR. LODEN: Your Honor, may I approach for one second, though?

THE COURT: Yes. I hope this is not on this case.

(Proceedings concluded at 10:51 AM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true and accurate record of the proceedings.

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